

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA BURNOM
Claimant

VS.

CESSNA AIRCRAFT CO.
Self-Insured Respondent

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Docket No. 1,056,443

ORDER

Respondent requests review of the September 14, 2011, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

The record on appeal is the same as that considered by the ALJ, consisting of the transcript of the August 18, 2011 preliminary hearing, with exhibits; the evidentiary deposition of Eric Scarbrough dated August 24, 2011; the evidentiary deposition of Shirley Shockley dated August 24, 2011; and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found claimant suffered a series of repetitive injuries to both knees while performing her regular job duties through her last day of work for respondent, April 25, 2011.¹ The ALJ also held that claimant gave respondent timely notice that her knee injuries were related to her work. The ALJ noted that she was able to assess claimant's credibility and found her to be a credible witness. The ALJ awarded claimant medical treatment with Dr. Paul Pappademos and found claimant is entitled to temporary total disability benefits commencing April 25, 2011, and continuing until released, "at a rate to be agreed upon by the parties."²

Respondent requests review of whether claimant sustained repetitive injuries to her knees arising out of and the course of her employment with respondent and whether respondent received timely notice of the alleged series of repetitive injuries. Respondent

¹ The claimant's actual last day of work was on April 21, 2011. Scarbrough Depo. at 12,15.

² Counsel for the parties stipulated at the preliminary hearing that the weekly temporary total rate would be the maximum weekly rate in effect on whatever date of accident was found by the ALJ. P.H. Trans. at 4.

argues that claimant first notified respondent of her alleged injuries on or around June 22, 2011, which is the day after the June 21, 2011, notice of intent, which demanded temporary total disability benefits and medical treatment, was served on respondent by claimant's counsel. Respondent further argues that this claim is governed by the 2011 amendments to the Kansas Workers Compensation Act which became effective on May 15, 2011 (New Act) and that the claim is not compensable under various provisions therein.

Claimant contends that she was injured each and every working day through her last day of work for respondent, including a specific accident on March 15, 2011, when she was accosted by a goose.³ Claimant argues that the claim is not covered under the New Act but is instead governed by the law in effect before the 2011 amendments (Old Act) since her last day of work was on April 21, 2011, before the New Act became effective. Claimant also asserts she provided timely notice of her alleged repetitive accidents as well as the alleged March 15, 2011, accident.

FINDINGS OF FACT

At the time of the preliminary hearing, claimant was 53 years old and had been working for respondent for 18 years. For the last 12 of those years, claimant worked as a parts control clerk. In 2002, claimant sustained a work-related injury to her right knee, which was treated surgically by Dr. Daniel Prohaska. The surgery consisted of a right partial lateral meniscectomy. Following completion of treatment for the 2002 injury, claimant returned to her regular duty in parts control. Claimant settled her 2002 claim. In 2008 or 2009, claimant was transferred to another part of respondent's facility, which she described as "the Distribution Center."⁴ According to claimant, her work at the Distribution Center required lifting large quantities of parts weighing 20 to 50 pounds and carrying them up and down stairs, which worsened the aching and swelling in both of her knees.

On her own, claimant consulted her personal care provider, Dr. Saleem Shahzad⁵, who referred claimant to Dr. Robert Eyster, an orthopedic surgeon. Dr. Eyster saw claimant on August 6, 2008, for left knee pain. Claimant told Dr. Eyster that "[s]he started having pain in October."⁶ Dr. Eyster reviewed a July 14, 2008, left knee MRI scan which revealed degenerative changes in all compartments of the left knee and some degenerative changes of both menisci. Claimant made no mention to Dr. Eyster of any

³ It is unclear from the record whether claimant alleges that this assault was perpetrated by one or more geese.

⁴ P.H. Trans. at 9.

⁵ There appear to be no records of Dr. Shahzad in evidence.

⁶ P.H Trans., Resp. Ex. 2 at 1.

connection between her work for respondent and the left knee symptoms. In his August 6, 2008, report to Dr. Shahzad, Dr. Eyster did not recommend surgery but predicted claimant would eventually require a total knee arthroplasty. He suggested claimant use anti-inflammatory medication and undergo Synvisc injections.⁷

Although claimant testified she knew her knee symptoms were related to her work for respondent, she did not report her injuries as work-related to respondent's Central Medical because she "didn't want to be laid off."⁸

With the passage of time claimant's knees worsened. Claimant scheduled an appointment with Advanced Orthopedics, presumably to see Dr. Prohaska, on September 11, 2008. Although claimant went to Advanced Orthopedics, she apparently left without actually seeing the doctor "due to ride issues." There are nurses notes of this encounter and they indicate that claimant worked for respondent as a materials clerk and that "she is on her feet a lot at work." There is, however, no indication that claimant told the nurse that her work served to cause or aggravate her symptoms. The nurse's notes do indicate that rainy weather increases her pain.⁹

Following her office visit with Dr. Eyster in 2008, claimant consulted another personal care provider, Dr. Heather Roe. Claimant continued to see Dr. Roe for her knees and other non-work-related health issues on several occasions in 2009, 2010, and 2011. Claimant was also seen for surgical consultations by Dr. Daniel Prohaska on May 26, 2011, and Dr. Paul Pappademos on June 15, 2011. There is no specific history in the medical records of Dr. Roe, Dr. Prohaska, or Dr. Pappademos that claimant's work duties for respondent played any part in the development of her knee symptoms. While claimant does comment to each of these physicians that a number of physical activities aggravated her knees, some of which claimant testified were required by her work, she also mentions experiencing pain with sitting, rising from a seated position, sports, reclining in bed at night, and "everyday activities."¹⁰ The diagnoses of Drs. Roe, Eyster, Prohaska, and Pappademos are all essentially the same: chronic bilateral knee pain or osteoarthritis of the knees. Other than Dr. Murati, none of the physicians whose records and reports were admitted into evidence at the preliminary hearing express the opinion that the claimant's work for respondent caused or aggravated the claimant's knee injuries.

Claimant retained the services of Dr. Pedro Murati, who examined claimant on July 18, 2011. Dr. Murati made treatment recommendations and imposed work restrictions. He

⁷ *Id.*

⁸ P.H. Trans. at 12.

⁹ P.H. Trans., Cl. Ex. 1.

¹⁰ P.H. Trans., Cl. Ex. 1, Dr. Prohaska's 5/26/11 report at 1, Dr. Pappademos' 6/15/11 report at 1.

diagnosed bilateral patellofemoral syndrome and permanent acceleration of bilateral knee osteoarthritis. In Dr. Murati's opinion claimant's current diagnoses are a direct result of claimant's work-related injuries sustained each working day, including a specific accident on March 15, 2011. Dr. Murati did not review the records of the claimant's personal care physicians.

Claimant alleges that while on her lunch break on March 15, 2011, she was walking around a duck pond located on respondent's premises when she was beset by either a goose or geese. Claimant felt that at least one of the attackers was trying to bite her. In an effort to extricate herself from the situation, claimant alleges she slid downward toward a ditch located next to the walkway. Claimant testified that although she landed on her hands, she somehow twisted her knees, causing increased pain in both knees. Claimant was unable to describe precisely how her knees were twisted in the incident. Claimant says she reported the "goose" incident to her supervisor, Eric Scarbrough. Other than the report of Dr. Murati, no mention is made of this event in the rest of the medical records and reports.

Claimant did not report her alleged repetitive knee injuries to respondent until June 21, 2011, when her attorney notified respondent in writing of his representation of claimant and provided notice of intent to file for a preliminary hearing. After that notification was received by respondent, claimant was contacted by Central Medical and was asked to fill out some papers. After her last day of work for respondent, claimant filed for Family and Medical Leave Act (FMLA) benefits and sought short-term disability benefits. None of the FMLA paperwork offered into evidence at the preliminary hearing and at Mr. Scarbrough's deposition makes reference to any work-related injury or injuries.

Respondent took the depositions of two lay witnesses, Eric Scarbrough and Shirley Shockley. Mr. Scarbrough was claimant's direct supervisor for approximately the last six months claimant worked for respondent. During that period, claimant was a parts marker, which required her to use a computer to input data regarding individual parts and identify the parts with an ink jet printer. The computer work could be done either sitting or standing, at the preference of the employee. Claimant worked on a single floor, so no stair climbing was required. Claimant's job under Mr. Scarbrough's supervision required standing, walking, moving parts around, and logging them into the computer. Prior to claimant's work as a parts marker, she worked in the stockroom and performed somewhat more strenuous duties.

Mr. Scarbrough was not told about the "goose" incident directly from claimant but he heard other employees discussing the event. Claimant did not ask for medical treatment for her knees, nor did she ever tell him that she was experiencing knee pain due to her work. Mr. Scarbrough admitted that following April 21, 2011, he heard claimant was alleging a work-related injury, although he was not told by claimant.

The other deposition taken on behalf of respondent was that of Shirley Shockley, a material control clerk for respondent. She performed the same job duties as claimant and was also supervised by Mr. Scarbrough. Ms. Shockley's testimony is largely duplicative of other evidence in the record.

PRINCIPLES OF LAW

Old Act

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹³

¹¹ K.S.A. 2010 Supp. 44-501(a).

¹² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹³ *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁴ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁵ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁶

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The

¹⁴ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁵ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁶ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

New Act¹⁷

L. 2011, ch. 55, sec. 1 provides in relevant part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, ch. 55, sec. 5 provides:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record *unless a higher burden of proof is specifically required by this act.*

L. 2011, ch. 55, sec. 5 also provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. *An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.*

(e) "*Repetitive trauma*" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. *The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.*

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

¹⁷ The italicized portions below represent language added to the statutes quoted.

(1) *The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;*

(2) *the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;*

(3) *the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or*

(4) *the last day worked, if the employee no longer works for the employer against whom benefits are sought.*

In no case shall the date of accident be later than the last date worked.

(f) (1) *"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.*

(2) *An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.*

(A) *An injury by repetitive trauma shall be deemed to arise out of employment only if:*

(i) *The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;*

(ii) *the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and*

(iii) *the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.*

(B) *An injury by accident shall be deemed to arise out of employment only if:*

(i) *There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and*

(ii) *the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.*

(3)(A) *The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:*

(i) *Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;*

(ii) *accident or injury which arose out of a neutral risk with no particular employment or personal character;*

(iii) *accident or injury which arose out of a risk personal to the worker; or*

(iv) *accident or injury which arose either directly or indirectly from idiopathic causes.*

...

(g) *"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor"*

in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

L. 2011, ch. 55, sec. 16 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

The ALJ found that the date of accident for claimant's alleged series of repetitive trauma was April 25, 2011, the date the ALJ found claimant last worked for respondent. Respondent argues the claim should be governed by the New Act, under which the date of claimant's alleged series of repetitive accidents could not be later than the last day

worked.¹⁸ The last day worked in this claim is April 21, 2011. Notice was not provided to respondent until June 21, 2011, when claimant's counsel served his demand letter on respondent. By that time, claimant's notice would likely be untimely under L. 2011, ch. 55, sec. 16, and the claim would be noncompensable for that reason. Claimant contends the Old Act applies but because her last injurious trauma occurred on April 21, 2011, that the correct date of accident for the series is June 21, 2011, the date claimant gave written notice of the claim to respondent.

This Board Member finds the ALJ correctly determined the Old Act applies to this claim and, accordingly, notice was timely. However, the correct date of accident is not April 21 or April 25, 2011, but is June 21, 2011. Although the date of accident is after the effective date of the New Act on May 15, 2011, the New Act does not apply because such would require an impermissible retroactive deprivation of substantive and vested rights.

The Kansas Supreme Court recently made the following comments in *Bryant*¹⁹:

As a preliminary matter, we note that during the 2010 legislative session the Kansas Legislature passed and the Governor signed into law significant changes to the Kansas Workers Compensation Act. See Substitute for H.B. 2134, effective May 15, 2011. These changes included the addition of a requirement that an accident or cumulative trauma be the prevailing factor in causing a compensable injury, medical condition, or resulting impairment. The new law also introduces several exclusions from compensability, including "triggering or precipitating events" and "aggravations, accelerations, or exacerbations of a preexisting condition." The amended statute removes any reference to disabilities resulting from the "normal activities of day-to-day living," although it addresses situations when employment increases risks or hazards to which workers would not have been exposed "in normal non-employment life." Substitute for H.B. 2134, sec. 5.

Despite these modifications, the statutory scheme in place when Bryant was injured and filed his claim continues to control in this case.

As a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operate retroactively. *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 220, 73 P.3d 753 (2003). Even if the legislature expressly states that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application. Substantive rights include rights of action "for injuries suffered in person." *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 667, 831 P.2d 958 (1992) (citing the Kansas Constitution Bill of Rights, § 18). The retroactive application of laws that adversely affect substantive rights violates a claimant's constitutional rights, because it

¹⁸ L. 2011, ch. 55, sec. 5.

¹⁹ *Bryant v Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

constitutes a taking of property without due process of law. *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 190, 883 P.2d 1177 (1994).

Nothing in the language of the Substitute for H.B. 2134 suggests that the legislature intended that the sections relevant to the present case be applied retroactively. In fact, the legislature singled out one section, new K.S.A. 44-529(c), for retroactive application and was silent about the application of the remainder of the statutory amendments. In addition, Bryant has a vested right to seek compensation for his injury, and retroactive application would violate due process.

There is no indication in the New Act that either L. 2011, ch. 55, sec. 5 or L. 2011, ch. 55, sec. 16 were intended by the legislature to have retroactive effect. Moreover, it is self-evident that the cited provisions are not merely procedural in nature, but rather affect substantive, vested rights. L. 2011, ch. 55, sec. 5 contains rules to be applied to determine the date of accident in claims involving injuries resulting from repetitive trauma. A number of rights and obligations in a workers compensation claim depend directly on the date of accident, including the weekly compensation rate and the date upon which an application for hearing must be filed with the Division. L. 2011, ch. 55, sec. 16 sets forth criteria for determining whether a claimant has provided the employer with notice of the accident and, as such, directly affects the compensability of the claim. To apply the cited provisions of the New Act to this claim would constitute a deprivation of property without due process and would therefore be unconstitutional.

This Board member finds that notice was timely provided in this claim pursuant to K.S.A. 2010 Supp. 44-508(d) and K.S.A. 44-520. Under those provisions, the date of accident is the date claimant provided notice of her claim to respondent, June 21, 2011. The record reflects that no authorized treatment was provided by respondent. Hence no restrictions were placed on claimant by any authorized physician. Claimant was never provided with a written communication that her diagnosis was work-related.²⁰

The more difficult issue in this claim is whether claimant sustained her burden of proof that she suffered a series of repetitive accidents arising out of and in the course of her employment with respondent. Claimant testified she experienced pain and other symptoms in both knees for years before her work for respondent ended in April 2011. The medical records of Dr. Roe, Dr. Eyster, Dr. Prohaska, and Dr. Pappademos all document a history of bilateral knee pain and all agree that claimant's diagnosis is osteoarthritis of both knees. Claimant testified she was told in 2002 by Dr. Prohaska that she had arthritic knees.²¹ None of the records from those providers indicate claimant ever told them her knee pain was caused or aggravated by her work. The treatment records in evidence cover a substantial time period. Claimant was seen by Dr. Eyster in August 2008, at which time

²⁰ See *Saylor v Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

²¹ P.H. Trans. at 25.

claimant told him she started having pain in October, which presumably is a reference to October 2007. Claimant was seen by Dr. Roe in September and December 2009; in April, June, and December 2010; and in May, June, and July 2011. Claimant was seen by Dr. Prohaska in May 2011 and Dr. Pappademos in June 2011. In none of those visits did claimant mention any connection between her work activities and her knee problems.

Claimant's testimony was that she told the physicians her knee issues were work-related; however, the medical records are inconsistent with that testimony. Not until she saw Dr. Murati on July 11, 2011, did claimant first make any specific mention to a physician that her work duties were connected with the condition of her knees. It is noted that Dr. Murati did not review all of the medical records.

Claimant told Dr. Prohaska and Dr. Pappademos that various activities worsen her symptoms, some of which were required by her work. However, claimant told the referenced doctors that she experienced knee pain with a variety of activities including rising from a seated position, sitting, reclining at night, walking, and "everyday activities."²²

The ALJ made a specific finding that, having observed claimant testify, claimant is a credible witness. While such a finding may be entitled to a degree of deference, the ALJ did not see Eric Scarbrough testify. She accordingly had no opportunity to compare the tones of voice and demeanor of claimant and Mr. Scarbrough. Moreover, the preliminary hearing transcript reveals claimant was repeatedly nonresponsive to questioning, particularly on cross-examination.

Claimant did not turn this claim in to respondent's Central Medical as a work-related injury or injuries until after she was contacted by Central Medical, which followed her counsel's written notice of the claim to respondent. Moreover, claimant's testimony is contradicted by Mr. Scarbrough's testimony. Claimant said she told Mr. Scarbrough her knee problems were work-related, but Mr. Scarbrough testified she did not. Claimant testified she told Mr. Scarbrough about the "goose" incident, but Mr. Scarbrough said she did not. Claimant's FMLA paperwork offered into evidence at the preliminary hearing and at Mr. Scarbrough's deposition makes no reference to any work-related injury or injuries.

This Board member finds that claimant has not satisfied her burden of proof that she sustained a series of repetitive accidents arising out of and in the course of her employment with respondent.

CONCLUSIONS

(1) The date of accident for claimant's alleged series of repetitive trauma is June 21, 2011.

²² P.H. Trans., Cl. Ex. 1, Dr. Prohaska's 5/26/11 report at 1, Dr. Pappademos' 6/15/11 report at 1.

(2) This claim is governed by the law in effect prior to May 15, 2011, because to apply the New Act retroactively to this claim would be an unconstitutional deprivation of property without due process.

(3) Claimant provided timely notice to respondent.

(4) Claimant did not sustain her burden of proof by a preponderance of the credible evidence that she suffered personal injury by a series of repetitive accidents arising out of and in the course of her employment with respondent.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 14, 2011, is hereby reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

GARY R. TERRILL
BOARD MEMBER

c: David M. Bryan, Attorney for Claimant
P. Kelly Donley, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge

²³ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).